consideration. That is not correct. The defendant's willingness to submit to judgment on the alternative reliefs is not a defence to the plaintiff's contention that he is entitled to specific performance. However, the learned trial judge in his judgment has referred to section 19 of the Specific Relief (Malay States) Ordinance 1950 as authority for the proposition that despite the defendant's willingness to pay the stipulated amount an agreement to transfer can be specifically enforced. So far as specific performance is an equitable relief it is within the discretionary power of the court to make an order. Section 19 gives the court such power in cases where an order for specific performance can properly be made. But in this case it is necessary to construe clause 3 of the agreement in order to arrive at the conclusion whether in terms of the contract the vendor has the option either to transfer the land or to pay the stipulated amount. Clause 3 reads in these terms:

"3. In the event of the first party refuses to transfer the said land unto the second party after the land has been subdivided by the Government the first party promise to refund the money three times the amount totalling $1,200/- (Dollars one thousand two hundred)."

If upon the true construction of this clause it can be held that the defendant has the option or choice of either transferring the land or paying the stipulated amount no order for specific performance can properly be made. See *Halsbury's* Laws of England, 3rd Edition, Vol. 36, page 274, paragraph 375. On the other hand if the defendant has no such option the existence of the provisions relating to the payment of the stipulated amount cannot prevent the court from making an order of specific performance. Either way the question is one of construction depending on the precise form of the contract. Here again, there is no finding based on such a construction.

Summarising all that I have said earlier, it would seem to me that inasmuch as there is no definite finding based upon the proper constructions of the relevant terms of the contract, the order for specific performance cannot be justified. I would be inclined to allow this appeal and direct that it be remitted to the High Court for retrial. I realise that this would involve additional costs but justice cannot be done between parties unless a retrial is so ordered.

Before concluding I might mention that in this appeal, quite apart from the ground that the learned trial judge has erred in law in making the order of specific performance (paragraph 1 of the memorandum of appeal), the appellant has also raised the point that the agreement was void *ab initio* or alternatively that it was frustrated by impossibility of performance (paragraph 2 of the memorandum of appeal). The validity of the contract or its frustration has not been raised or argued in the court below as a defence. There is no good reason to justify a new point to be raised or argued on appeal.

I would allow this appeal with costs and order a retrial.

Appeal dismissed. Trial judge's order varied as in last paragraph of Suffian F.J.'s judgment.

Solicitors: *Rithaudeen & Aziz; Jega & Co.*

HANISAH v. TUAN MAT

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) January 9, 1970]
[Kuala Trengganu — Federal Court Civil Appeal No. X24 of 1968]

Malay Reservations — "Malay" — Meaning of — Certificate of Executive Council — Duty of court to interpret statutes — Kelantan Malay Reservations Enactment, 1930, ss. 12 & 13.

The respondent had obtained a declaration that the transfer of certain land in Kelantan to the appellant was null and void as the appellant was not a Malay. The trial judge had referred the question as to whether the appellant was a Malay or not to the State Executive Council, and the State Secretary in a letter certified that the Executive Council had decided that the appellant was not a Malay. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the letter from the State Secretary was not binding on the court as it was not a decision of His Highness the Sultan in Council but of the Executive Council;

(2) the respondent had not discharged the onus of satisfying the court that the appellant was not a Malay and not a native of Kelantan.

Cases referred to:

(1) *Home* v. *Lord Camden* (1795), 6 Bro. Parl. Cas. 203; 1 H.B.L. 476; 2 E.R. 1028.

(2) *Prohibitions Del Roy* (1607), 12 Co. Rep. 63; 77 E.R. 1342.

(3) *Russell* v. *Ledsam* (1845), 14 N. & W. 574, 589; 153 E.R. 604.

(4) *Rahmah binti Ta'at* v. *Laton binti Malim Sutan* (1927), 6 F.M.S.L.R., 128.

FEDERAL COURT.

Dato' Wan Mustapha bin Haji Ali for the appellant.

Dato' Isahak Hamid for the respondent.

Cur. Adv. Vult.

Suffian F.J.: I am of the opinion that this appeal should be allowed.

The learned judge held that Hanisah (the appellant) is not a Malay and not a native of Kelantan because (1) she made no attempt to support the assertion in her affidavit that she is a Malay and a native of Kelantan by producing a birth certificate, (2) the State Secretary's letter concluded the matter against her, and (3) her affidavit sworn on 18th February, 1967, came too late in view of the State Secretary's letter which had been written on 14th March, 1966.

With respect, the State Secretary's letter did not conclude the matter. The letter reported a decision of the Executive Council, whereas section 13 of the Malay Reservations Enactment says that it is the decision of His Highness the Sultan in Council that "shall

not be questioned or revised by any court". The two bodies are quite distinct. The State Executive Council is a body consisting of politicians who have been elected to the State Legislative Assembly, whereas His Highness in Council means "His Highness acting in accordance with the advice of the State Executive Council". See the First Part of the Kelantan Constitution, articles IV(1) and XVI.

Apart from the State Secretary's letter, what evidence is there to show that Hanisah is not a Malay and not a native of Kelantan? It is for Tuan Mat, the respondent, to produce such evidence. The only evidence he produced is the bare assertion in his affidavit that the deceased Hajah Engku Lebar binti Engku Endok had adopted a female Chinese born in Singapore and given her the name of Hanisah binti Abdullah also known as Hanisah binti Mohamed. As against this there is Hanisah's own affidavit in which she said —

"3. Since infancy I know of no other except Hajah Engku Lebar binti Engku Endok as my only mother and was living with her until her death.

5. I am a Malay and a native of Kelantan as defined in the Malay Reservations Enactment, 1930, and the Kelantan Land Enactment, 1938. If it were otherwise, the Land Registrar would have rejected my presentation Nos. 111/48 and 365/60 in respect of both lots."

There was no oral or documentary evidence in these proceedings. There were only the affidavits of the parties, each flatly contradicting the other. Bearing in mind that it was for Tuan Mat, the respondent, to satisfy the court that Hanisah is not a Malay and not a native of Kelantan, I do not think that the evidence produced by him can be said to do so.

I would therefore allow this appeal.

Before leaving this matter, I would like to draw the authorities' attention to the desirability of considering in similar cases in the future the impact of the definition of "Malay" in Articles 89 (6) and 160 (2) of the Malaysian Constitution on the definition of "Malay" for purposes of the Malay Reservations Enactment.

Azmi L.P. concurred.

Ali F.J.: This appeal arose from an order of the High Court, Kota Bharu, declaring as null and void the transfer of lands held under Lots Nos: 973 and 974 in Kelantan to the appellant. The declaration was made pursuant to section 12(i) of the Kelantan Malay Reservations Enactment 1930, which declares null and void all dealings or transfers whatsoever of reservation land contrary to the provisions of the Enactment.

By a notice of motion dated 14th April, 1964, the respondent in this appeal has asked for the declaration on the ground that the appellant, being of Chinese origin, is not a Malay within the meaning of the Enactment. The motion was supported by an affidavit affirmed by the respondent who alleged in paragraph 5 in these terms:

"During her life time the said Hajah Engku Lebar binti Engku Endok, deceased, adopted a female Chinese child born in Singapore and gave her the name of Hanisah binti Abdullah also known as Hanisah binti Mohamed."

So far as these are allegations of fact they have not been substantiated by evidence. The only evidence on which the court's declaration was founded was that of a letter from the State Secretary, Kelantan certifying a decision by the State Executive Council that the appellant is not a Malay. This decision was in reply to a letter from the late Hashim J. who, soon after the notice of motion was filed, wrote in the following terms:

"Ref: E.B.H.C. O.M.13/64 28th May, 1964.
The Hon'ble the State Secretary,
Kelantan,
State Secretariat,
Kota Bharu

It is regretted that this memorandum is to be in English language in view of section 3(ii) of the Malay Reservations Enactment 1930. This section reads as follows:—

'If before any court any difficulty or dispute arises as to the meaning or object of any expression, definition or provision of this Enactment, the meaning or object of the corresponding expression, definition or provision of the English version of this Enactment shall be followed and adopted.'

The facts of the case are as follows:—

On 7th May, 1960 one Hajah Engku Lebar binti Engku Endok transferred Lot No. 974 Mukim Baka, Daerah Ulu Sat, Machang, to one Che Hanisah binti Abdullah also known as Che Hanisah binti Mohamed. This transfer was registered in the Land Office. It would appear that Che Hanisah is a Chinese but adopted by Engku Lebar when she was a baby. Che Hanisah has been a Muslim since her adoption.

A Malay is defined in section 3(i) as follows:—

'Malay' means a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; and shall include (a) the Majlis Ugama Islam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay.

It would appear that at the moment we have in Malaya Malayan Chinese and Malayan Indians whatever that may mean. The question now is whether Che Hanisah can be classified as a Malay? Could it be said that a Malayan Chinese is of Malayan race? I think it would be a good idea if this matter is brought to His Highness the Sultan in Council under section 13 of the Enactment.

(Sd) M.M. Hashim,
Judge."

The question in this appeal is whether the declaration so made by the court can be upheld. The appellant's case before us is on the footing that the late Hashim J. was wrong in referring a question of interpretation of a provision of local statute to the State Executive Council for decision. Upon consideration there is merit in this. The issue raised by the notice of motion necessarily involved the consideration of the question whether or not the appellant is a Malay within the meaning of the Kelantan Malay Reservations Enactment 1930. A question of construction is a question for the court. As was pointed out by Eyre C.J. to the House of Lords in *Home* v. *Lord Camden*,[1] the duty of expounding Acts of Parliament devolves solely upon the King's temporal courts. This duty was once claimed as a right by James I, and Coke reports in *Prohibitions Del Roy*[2] the opinion on the point which he delivered, "with the clear consent of all the judges of England and the Barons of the Exchequer," to the effect that "the King in his own person cannot adjudge any case." As concerns the Legislature it was pointed out in *Russell* v. *Ledsam*[3] by Parke B. that —

"the province of the Legislature is not to construe, but to enact, and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on courts,

whose duty is to expound the statutes they (the Legislature) have enacted."

In the Introductory Chapter in *Craies* on Statute Law, 5th Edition, the following passage appears on page 12:

"It would be no easy task to ascertain at what period and by what means the courts of law obtained the right of being the sole expositors of the statutes of the realm. In the early ages of the English system it appears that the line between the Judiciary and the Legislature was not distinctly marked. Originally the House of Lords and Commons sat together, and the courts of law were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance. But it is now one of the axioms of our law that it is not only 'the right' but also the duty of the Judiciary to expound and interpret doubtful provisions of our legislative enactments."

It was in recognition of this judicial authority to interpret statutes that led Thorne J. to say in the Court of Appeal case of *Ramah binti Ta'at* v. *Laton binti Malim Sutan*[4] that —

"local law is a matter of which the court must take judicial notice. The court must propound the law, and it is not competent to the court to allow evidence to be led as to what is the local law."

If the late Hashim J. was wrong to have addressed the letter, as he did, to the State Secretary, Kelantan, then, I think, it was wrong to use the reply thereto as evidence to support the notice of motion. However, even assuming that the reply from the State Secretary was rightly admitted as evidence it could only suggest to the court that the State Executive Council has decided that the appellant is not a Malay. Thereupon it became necessary to consider whether it would be proper to order a declaration in terms of the motion. An order of court can only flow from its decision. This must be so for a court judgment is necessarily based on its conclusion on the issue raised for consideration. The issue in this case is whether the appellant is or is not a Malay within the meaning of the Malay Reservations Enactment. It has not been decided by the court but by the State Executive Council. The learned trial judge for reason which is apparent from the judgment has declined to decide on the issue. He may or may not be justified in so declining. But the fact remains there was no decision of court on which a declaration could be founded. In my judgment the court should have dismissed the motion as no declaration could possibly be made. As against this view it may be argued that in terms of section 13 of the Malay Reservations Enactment, the court is bound to act on the decision by the State Executive Council. I cannot find anything in that section to support such a contention. All that it says is that a decision under that section should not be revised or questioned by any court. To contend that this section gives the court the choice of either deciding on a question of construction or referring such question to the State Executive Council for decision is to suggest an intention on the part of the Legislature to depart from established principle. Without express words it would not be right to import such an intention. For the reasons stated I would allow this appeal.

It remains for consideration whether it is necessary to remit this case to High Court for a rehearing. Such a rehearing can only be on the affidavits filed by the parties. The respondent's affidavit could not possibly lead to the conclusion that the appellant is of Chinese origin. There was absolutely no evidence to support the allegation in paragraph 5. On the other hand there is every reason to presume that the appellant is a Malay. I say this because the Register of Titles provides *prima facie* evidence that as owner of reservation land she is a Malay. At any rate on the affidavits as a whole there is nothing to justify a rehearing.

Appeal allowed.

Solicitors: *Wan Mustapha & Co.; Isahak Hamid & Co.*

MALAYAN RAILWAY ADMINISTRATION v. WONG AH LEK & ORS.

[A.C.J. (Pawan Ahmad J.) January 9, 1970]

[Kuala Lumpur — Civil Appeal No. 27 of 1967]

Workmen's Compensation — Claim for indemnity by employer against person responsible for injury to workman — No proof of reduction of earning capacity — Workmen's Compensation Ordinance, 1952 s. 20 (b).

In this case the workman was employed as an assistant shunter by the Malayan Railways. In the course of his duties he was injured in an accident caused by the negligence of the 1st respondent in driving a car into the railway area. By agreement between the employers and the workman a lump sum of $1,659.12 was awarded as compensation by the Commissioner for Workmen's Compensation. Subsequently the employer claimed indemnity from the respondents. On the refusal of the respondents to meet the claim the matter went before the president, sessions court. The learned president held that the respondents were not liable to indemnify the appellants, the Malayan Railways, as the appellants had failed to prove that there was a reduction in the workman's earning capacity as a result of the accident. It appeared that when the workman recovered from his injuries he was posted as a pointsman which was one grade lower than his previous post, but he was given the same salary as before. The appellants appealed.

Held, dismissing the appeal: the appellants had not proved that the workman's earning capacity had been reduced and therefore the learned president was right in rejecting the claim for indemnity.

Cases referred to:-

(1) *Thompson & Sons* v. *North Eastern Marine Engineering Co. Ltd.* [1903] 1 K.B. 428, 437.

(2) *Anglo Oriental Plantations Ltd.* v. *Rajammah* [1963] M.L.J. 54, 56.

CIVIL APPEAL.

J. J. Puthucheary for the appellants.

Cheah Bian Hock for the respondents.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an appeal from the decision of the learned president of the sessions court, Kuala Lumpur, sitting on arbitration under the Workmen's Compensation Ordinance 1952 whereby the president dismissed the appellants' claim against the respondents for indemnity under section 20 (b) of the said Ordinance.

Briefly, on 27th October 1962 the workman, one Ujang bin Aris, was employed by the Malayan Rail-